Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1979

No. 78-1947

DAVID ABRAMOVICH,

Petitioner,

v.

THE BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO. 1 OF THE TOWNS OF BROOKHAVEN AND SMITHTOWN, SUFFOLK COUNTY, NEW YORK, a/k/a THREE VILLAGE CENTRAL SCHOOL DISTRICT No. 1,

Respondent.

Brief in Opposition to Petition for a Writ of Certiorari to the Court of Appeals of the State of New York.

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Respondent.

Brief in Opposition to Petition for a Writ of Certiorari to the Court of Appeals of the State of New York.

Counterstatement of Questions Presented Pursuant to Rule 40.

Is a stipulation between a teacher and a school district freely entered into during a disciplinary hearing by the terms of which (a) that hearing is terminated and (b) the teacher agrees to serve a four month trial period during which his competence will be evaluated by his new principal, binding upon both the teacher and the school district?

Counterstatement of Facts Pursuant to Rule 40.

David Abramovich was employed by the Three Village Central School District to teach in the elementary grades and was tenured as an elementary teacher.

In May, 1975, pursuant to the appropriate sections of the Education Law, the Assistant Superintendent for Personnel preferred forty-nine specific charges of insubordination, incompetency, neglect of duty, and conduct unbecoming a teacher against Mr. Abramovich. The Board of Education found probable cause as to each and every charge, and the teacher demanded a hearing. In due course, a hearing panel of three members was selected; and a hearing officer was appointed by the Commissioner of Education. The hearings commenced on September 4, 1975, and continued on October 6 and October 7 during the course of which the School District commenced its presentation of evidence (both written and oral) through the testimony of its witnesses. The teacher was represented by Counsel for the New York State United Teachers and advised by a "N.Y.S.U.T." field representative and the Teachers' Association President.

Discussions took place concerning a possible settlement among the hearing officer, the attorneys for the School District, the attorney for the teacher and the two union representatives on the third day of the hearings and resulted in a stipulation of settlement entered upon the record and agreed to by all parties including not only the principal's representatives, but by the principals themselves (Appendix in Petition pp. 89-130).

The stipulation provided (1) that the teacher would take an unpaid leave of absence until September, 1976; (2) that he would be re-employed at that time and serve under a new school principal until December of 1976; (3) that this school principal would supply the teacher with written criteria setting forth his expected standards of conduct before January 1, 1976 (nine months before he reported for duty); (4) that the School District would supply the teacher on or before that date with a written list of the areas in which the District believed him to be

deficient; (5) that the School District would provide the teacher with special instruction in the teaching of reading and other specialties; (6) that the School District would permit the teacher to audit classes during that current school year; (7) that the School District would withdraw the charges with prejudice; (8) that the school Principal would evaluate the teacher during the period from September to December, 1976, based on the criteria supplied by him to the teacher; and, (9) that his evaluation would be binding on both parties and would determine whether the teacher was to be continued or terminated. The stipulation clearly stated that no appeal could be made by either party, and if the stipulation were held to be illegal, the charges were to be reinstated and the hearing continued. The teacher, under oath, swore that he understood all of these agreements (Petition pp. 114-122).

The School District provided the list of deficiencies (Appendix A); the School District supplied the criteria (Appendix B); the School District made its specialists available for the teacher's instruction; the teacher reported for duty in September, 1976, and his principal found him unfit in December, 1976.

The teacher then brought a proceeding in the Supreme Court, Suffolk County, New York under CPLR Article 78 alleging that he never retained the attorneys who represented him during the three days of hearings; that although his attorney recommended he agree to the stipulation, he never really understood it; and he was illegally terminated on the advice of the school principal because his dismissal was not the result of a further hearing on new charges.

The trial court held that the teacher was properly represented and understood the stipulation, but that the stipulation was totally void as against public policy. The Court ordered the teacher reinstated but held that no

further hearing on the old charges could be had even though the parties had agreed to reinstate the charges in the event the stipulation was held to be illegal.

The School District appealed and the Appellate Division, Second Department, unanimously reversed Special Term, holding that the stipulation made, as it was, in open "court" with both sides fully represented, was not against public policy.

Upon appeal, the New York Court of Appeals unanimously affirmed.

ARGUMENT.

I.

A party may waive constitutional rights to a due process hearing.

This court has held that a civil litigant may waive his due process rights to a notice and a hearing prior to judgment.

> *D. H. Overmyer Co., Inc. of Ohio v. Frick Company,* 405 U.S. 174, 31 L. Ed. 2d 124, 92 S. Ct. 775 (1972).

The same is true of a criminal defendant.

> *Illinois v. Allen,* 397 U.S. 337, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970).

To be valid, the waiver must be made under circumstances which assure the court that there was no overreaching on the part of the other party and that the one waiving knew or should have known the importance of his waiver.

> *National Equipment Rental Ltd. v. Szukhent,* 375 U.S. 311, 84 S. Ct. 411, 11 L. Ed. 2d 354 (1964); *United States v. Fong,* 529 F. 2d 55 (CCA 9th, 1975).

The state need not prove that the person waiving knew that he had the right to refuse to waive.

> *Schneckloth v. Bustamonte,* 412 U.S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973).

In the case at bar, the teacher demanded a hearing by a panel of three experts who were charged with the responsibility of determining the validity of the many changes levied against him. They were to recommend the penalty, if any, to the Board of Education, which, under the law as it then stood, was to make a final determination, which in turn, was appealable to the state courts.

> *Education Law,* §3020(a).

It was during these hearings, after evidence had been given both in oral and written form, that the parties and their counsel agreed to a withdrawal of the charges; a reassignment of the teacher to a new school; a reappraisal of his conduct there by the principal. The school was to, and did, supply him with a list of his deficiencies and methods of improvement.

Petitioner entered into this agreement voluntarily and knowingly.

> "The Hearing Officer: All right. Did you understand the stipulation?
> The Witness: Yes.
> The Hearing Officer: And, you understand, Mr. Abramovich, that you have a right not to settle this case, that you have a right to continue this hearing?
> The Witness: Yes.

. . .

The Hearing Officer: And you feel you understand fully each and every part of the stipulation?
The Witness: Yes, I do.

. . .

The Hearing Officer: All right. And, do you understand further that, when you resume your employment in September of 1976 and continue through to the Christmas vacation in December of 1976, that at that point you are entirely in the hands of Mr. John Burns, the Principal of the Mount School?
Off the Record.

(Discussion off the Record.)
The Hearing Officer: On the record; what I mean by that is, whether or not you are retained in employment past Christmas, 1976, is in the sole discretion of Mr. Burns.
The Witness: I understand that.
The Hearing Officer: All right. And that if he decides for whatever reasons . . . that you are not to be retained, you have no further right of appeal.
The Witness: Yes."

The record shows that his counsel and union representatives were present and agreed to the arrangement.

Having once agreed by this form of decision, the petitioner should not now be free to withdraw.

Keys v. Sawyer, 353 Fed. Supp. 936 (DCSD tex, 1973).

This is not a case which petitioner received nothing for his agreement. Here, the school district withdrew the charges in the midst of the trial.

McDonough v. Hardware Dealers Mutual Fire Insurance Co., 448 F. 2d 870 (CCA 1st, 1971);
United States v. Gomez, 457 F. 2d 593 (CCA 4th, 1972);
Zerschausky v. Beto, 396 F. 2d 356 (CCA 5th, 1968) Cert. Den. 393 U.S. 1004, 89 S. Ct. 493, 21 L. Ed. 2d 468.

Perhaps the petitioner, when he chose to be judged by Mr. Burns rather than the panel assembled, thought he would be better off. He may have been mistaken, but his choice was not unconstitutional.

Davis v. Dunbar, 394 F. 2d 754 (CCA 9th, 1968) Cert. Den. 393 U.S. 884, 89 S. Ct. 192, 21 L. Ed. 2d 159.

Nor is petitioner's claim that he was under duress because, under State law, the Board of Education played both an investigative and administrative role supported either by the evidence or by law.

Withrow v. Larkin, 421 U.S. 35, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1974).

"The initial charge or determination of probable cause and ultimate adjudication have different bases and purposes. The fact that the same agency makes them in tandem and that they relate to the same issues does not result in a procedural due process violation." P. 58 (p. 1470).

Conclusion.

The petition should be denied because:

(a) there is no evidence of overreaching;

(b) there is ample evidence that the petitionr knew what he was doing when he agreed to the stipulation of settlement;

(c) his agreement was based on substantial consideration;

(d) thus, the waiver of further hearings was constitutionally acceptable.

Respectfully submitted,

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PETER V. SNYDER, Esq.,
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KEVIN A. SEAMAN, Esq.,
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APPENDIX A.

November 6, 1975

To: Dr. P. Hoban
From: Warren Hochberg
Re: David Abramovich

Mr. Abramovich evidenced the following deficiencies during the 1973-74 and 1974-75 school years. He was unable to:

1. diagnose in the reading area
2. prescribe in the reading area
3. evaluate in the reading area
4. teach reading
5. conduct reading groups
6. diagnose in the language area
7. prescribe in the language area
8. evaluate in the language area
9. diagnose in the arithmetic area
10. prescribe in the arithmetic area
11. evaluate in the arithmetic area
12. conduct an adequate science program
13. conduct an adequate social studies program
14. understand how to teach skills
15. motivate pupils to academic interests
16. follow curriculum guides
17. use a basal text
18. keep student records
19. report observable pupil behavior

20. plan on a yearly basis
21. plan on a short term basis
22. plan on a daily basis
23. provide plans for his substitutes
24. help his pupils plan
25. help his pupils evaluate
26. follow school rules
27. keep appointments
28. follow suggestions for improvement
29. demonstrate regard for school processes
30. set acceptable standards of work
31. set reasonable expectations for behavior
32. develop an atmosphere conducive to learning
33. use audio-visuals effectively
34. develop performance objectives
35. supervise pupils
36. respond to administrative requests
37. respond to administrative directives
38. keep accurate attendance records
39. maintain a safe environment
40. follow contract stipulations
41. fill out report cards properly
42. develop a classroom management system
43. control classroom distractions
44. control pupil movement in class
45. control pupil movement in halls
46. control pupil movement on playground

47. help pupils to observe school rules
48. demonstrate regard for school property
49. care for school materials
50. arrive in time for many staff meetings
51. arrive in time for work on many days
52. maintain a clean environment.

WH/jh

APPENDIX B.

WILLIAM SIDNEY MOUNT SCHOOL

STONY BROOK, NEW YORK

11790

THE THREE VILLAGE CENTRAL SCHOOL DISTRICT

December 17, 1975

Mr. David Abramovich
7 Central Avenue
Miller Place, New York 11764

Dear Mr. Abramovich:

This letter is in response to Dr. Hoban's request to establish your goals and grade placement. You have been assigned a fourth grade position with the following expectations:

I. *Teacher's administrative responsibilities:*

a) To follow all time schedules.

b) To keep accurate attendance, testing and pupil progress to parents.

c) To follow an approved procedure for reporting pupil progress to parents.

d) To read, understand and comply with all items in the "Mount Manual".

(See attached marked A—An updated "Mount Manual" will be provided in August.)

e) To read, understand and comply with all notices from the "Office of Principal".

f) To provide the Principal's Office with all written responses that are requested.

II. *Supervision responsibilities:*

a) To provide the proper supervision of your class at all times scheduled.

b) To take responsibility for supervision of any on the spot situation that arises in the school with all Mount students.

c) To establish a successful discipline program for your class.

d) To properly carry out all supervision duties assigned.

Note—Supervision and discipline responsibilities are covered in detail in the "Mount Manual". See attached marked A.

III. *Curriculum:*

a) You should use the following sources:

1. New York State Curriculum Guides
2. Three Village Curriculum Guide
3. Approved textbook series

b) Any change, addition or omission must be approved by the building principal.

c) You are expected to have knowledge of all subject areas. To be able to provide curriculum instruction that is appropriate to the individual needs of the student.

IV. *Instructional philosophy and skill:*

a) To be able to incorporate all the suggestions enumerated in "My Philosophy and Thoughts about Education". See attached marked B.

b) To be able to provide basic skills, enrichment and remedial help to all students in a variety of ways, so that you can match the student's learning style or strength with an appropriate approach.

c) To be thoroughly familiar with all aspects of the "Phases of Learning". See attached marked C.

V. *Classroom Organization, Planning and Instructional Techniques:*

All suggestions and activities outlined in attached notices B, D, & E should be researched and incorporated into your program.

VI. *"September" Goals:*

Each September the staff is asked to establish goals with the principal. In your situation, I am establishing the above goals (Paragraphs I through V) and the following goal:

To successfully carry out all the responsibilities of a teacher and to correct all deficiencies listed on the letter from Mr. Hochberg dated November 6, 1975.

In conclusion, I would like to comment on evaluation since, my evaluation of you is of utmost importance. I am extremely proud of my staff at Mount School and I consider you as a potential permanent member. To *earn* this position, I must be assured that you have succeeded

in your job to a degree of competence commensurate with a *Mount* teacher.

I wish you the best in your preparation and assignment to Mount School.

Sincerely,

JOHN A. BURNS
Principal

JAB:jf
cc: Dr. Hoban and Mr. Harto

encls.

a) The Mount Manual marked A.

b) My Philosophy and Thoughts about Education marked B.

c) Phases of Learning marked C.

d) Personal goals for consideration marked D.

e) Items for consideration when using the "End-of-Year Evaluation Form" marked E.

f) Memorandum to Dr. Hoban from Mr. Hoehberg dated November 6, 1975 marked F.